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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition for Rule Making to Modify)
Channel Allotment for Television Station)
KXLF-DT, Butte, Montana)
(Amendment of Section 73.622(b))
Table of Allotments,)
Digital Television Broadcast Stations)
(Butte, Montana)))

MM Docket No. _____
RM- _____

Petition for Rule Making)
to Modify Channel Allotment)
for Television Station KECI-DT)
(Missoula, Montana))

MM Docket No. _____
RM-10172

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**REPLY TO OPPOSITION
TO MOTION TO STRIKE
EAGLE COMMUNICATIONS, INC.'S
REQUEST TO DENY PETITION FOR RULE MAKING**

Pursuant to Section 1.45 of the Commission's Rules,¹ KXLF Communications, Inc. ("KXLF Communications"), licensee of KXLF-TV, Butte, Montana, by its attorneys, hereby submits this Reply to the Opposition of Eagle Communications, Inc. ("Eagle") to KXLF Communications' Motion to Strike Eagle's Request to Deny KXLF Communications' Petition for Rule Making.²

¹ 47 C.F.R. § 1.45 (2000). This Reply is timely filed under the Commission's Rules. See 47 C.F.R. §§ 1.45; 1.4(g); 1.4(h); Public Notice, "Federal Communications Commission Closes Offices" (rel. Sept. 12, 2001).

² Opposition to Motion to Strike filed September 7, 2001, by Eagle Communications, Inc. ("Eagle Opposition").

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INTRODUCTION

On January 10, 2001, KXLF Communications filed a petition for rule making requesting the substitution of Channel 5 for Channel 15 for use by KXLF-DT ("KXLF Petition"). Two and a half months later, on March 21, 2001, Eagle filed a petition for rule making proposing to substitute Channel 5 for Channel 40 for use by KECI-DT, Missoula, Montana ("Eagle Petition"). The KXLF Petition and the Eagle Petition are mutually exclusive, and the Commission has not yet released a Notice of Proposed Rule Making in response to either petition for rule making.

On August 7, 2001, Eagle filed a Request to Deny the KXLF Petition ("Eagle Request") in favor of its later-filed petition for KECI-DT. On August 22, 2001, KXLF Communications filed an Amendment and Supplement to the KXLF Petition and filed a Motion to Strike the Eagle Request ("KXLF Motion to Strike") as an unauthorized pleading because the Commission's Rules do not provide for the submission of statements in response to a petition for rule making to amend the Television Table of Allotments prior to the release of a Notice of Proposed Rule Making. On August 31, 2001, Eagle filed a Motion for Extension of Time to respond to the KXLF Motion to Strike. On September 7, 2001, Eagle filed an Opposition to the KXLF Motion to Strike.

In its Opposition, Eagle acknowledges that the Commission's Rules do not permit the submission of the Eagle Request and fails to provide any justification for its request that the Commission disregard its procedural rules and act on the KXLF Petition without the benefit of any other public comment. Accordingly, KXLF Communications respectfully requests that the Commission dismiss the Eagle Opposition and the Eagle Request forthwith and issue a Notice of Proposed Rule Making in response to the KXLF Petition.

I. EAGLE’S PREMATURE SUBMISSIONS MUST BE DISMISSED AS UNAUTHORIZED PLEADINGS.

As explained in the KXLF Motion to Strike, the Commission’s rules do not permit the submission of comments on proposed amendments to the Television and FM Table of Allotments before a Notice of Proposed Rule Making is issued formally soliciting comments.³ Accordingly, the Eagle Request is an unauthorized pleading because it comments on the KXLF Petition prior to the Commission’s release of a Notice of Proposed Rule Making.⁴ Eagle agrees: “KXLF is correct in its assertion that objections concerning rule making proposals are ordinarily not considered until an actual rule making proceeding has been commenced.”⁵ It is therefore undisputed that the Eagle Request is procedurally deficient.

Given that the Commission does not permit comments to be filed prior to a Notice of Proposed Rule Making, it should come as no surprise that the Commission’s Rules do not provide procedures for such prohibited filings. Yet, Eagle attempts to justify its unauthorized submission prior to the release of a Notice of Proposed Rule Making by arguing that “the Commission’s Rules provide no formal procedures through which rule making petitions may be opposed.”⁶ Obviously, the Commission does not provide such procedures because it does not permit the filing of comments prior to the release of a Notice of Proposed Rule Making. Eagle then states that because there are no such formal procedures to permit such filings, “the only means by which a substantively valid objection to a rule making request may be placed before

³ See KXLF Motion to Strike at 3-5; Amendment of Policies and Procedures for Amending the FM Table of Assignments, Section 73.202(b) of the Commission’s Rules, *First Report and Order*, 88 FCC 2d 631, ¶¶ 7-8 (1981); 47 C.F.R. § 1.405 (2000).

⁴ See KXLF Motion to Strike at 3-5.

⁵ Eagle Opposition at 2.

⁶ *Id.*

the Commission is through the informal filing process utilized by Eagle.”⁷ Eagle’s argument makes no sense. The Commission’s prohibition on filing such comments and the absence of procedural rules for filing such comments do not authorize Eagle to evade the Commission’s Rules by submitting an “informal filing.” Moreover, in stating that this is “the only means by which”⁸ it may file its objection to the KXLF Petition, Eagle blatantly disregards the fact that, like other interested parties, it will have ample opportunity to raise any issues during the notice and comment period set forth in a Notice of Proposed Rule Making.

Eagle provides no legal authority to support its assertion that “special circumstances” authorize the Commission to disregard its procedural rules or act on the KXLF Petition based solely on Eagle’s unauthorized submissions without the benefit of any public comment, including comment from KXLF Communications.⁹ The lack of any legal support for Eagle’s claim is undoubtedly due to the fact that no authority can sustain its claim.

Eagle concedes that the Commission does not permit the filing of comments regarding pending petitions for rule making prior to a Notice of Proposed Rule Making, but fails to provide any basis, procedural or substantive, why the Commission should not simply dismiss the Eagle

⁷ *Id.*

⁸ *Id.*

⁹ *See id.* at 2-3. Despite Eagle’s incorrect assertion that KXLF Communications has submitted “full responses,” KXLF Communications has not responded to the substance of the Eagle Request. *See id.* at 3. KXLF Communications stated in its Motion to Strike that “[t]o comply with the Commission’s rules regarding formal proceedings, KXLF Communications will wait until the Commission issues a responsive Notice of Proposed Rule Making to raise the comparative merits of the proposed KXLF-DT facilities.” KXLF Motion to Strike at 7-8. As stated herein, KXLF Communications will address the substance of the Eagle Request and the Eagle Opposition at the appropriate time during the notice and comment period following a Notice of Proposed Rule Making in accordance with the Commission’s rules.

Request and Eagle Opposition. Both of Eagle's unauthorized pleadings should be dismissed without further consideration.

II. EAGLE PERSISTS IN SUBMITTING ARGUMENTS BASED ON FACTUAL INACCURACIES.

Eagle's arguments both in the Opposition and the Request regarding the substance of the KXLF Petition and the Eagle Petition have no merit whatsoever. As stated in its Motion to Strike, KXLF Communications intends "[t]o comply with the Commission's rules regarding formal proceedings . . . [and] will wait until the Commission issues a responsive Notice of Proposed Rule Making to raise the comparative merits of the proposed KXLF-DT facilities."¹⁰

Given that Eagle persists in ignoring these procedural rules, however, KXLF Communications hereby assures the Commission that it will address the substance of Eagle's submissions during the comment period following issuance of a Notice of Proposed Rule Making. Among the issues KXLF will address are the inaccuracy of Eagle's engineering figures and that Eagle's conclusions based on these figures are false. KXLF Communications also will demonstrate the deficiencies of Eagle's arguments on KXLF's proposed facilities and refute Eagle's absurd claims concerning electrical noise in Butte as compared to Missoula, Montana.¹¹ Of course, KXLF Communications also is prepared to and will address the comparative merits of its proposed facilities over those proposed by Eagle.

¹⁰ KXLF Motion to Strike at 7-8.

¹¹ As an example of the ridiculous nature of Eagle's electrical noise arguments, Eagle purports to submit a study comparing interference to low band stations in Butte versus Missoula, Montana, while conceding that "[i]t is not possible to conduct a similar test in the Missoula TV viewing area because there are no low band stations broadcasting there." Eagle Opposition, Declaration of Charles J. Cannaliato at 2.

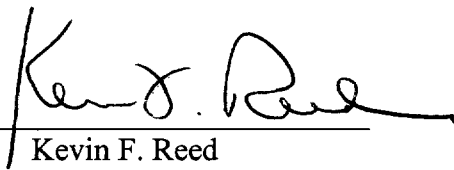
Eagle's unauthorized pleadings, rife with inaccuracies and unsubstantiated claims, clearly have no purpose other than to delay the Commission's processing of the KXLF Petition and to impede KXLF Communications' construction and operation of its DTV facilities.¹² The Commission should not permit Eagle to continue to subvert its processes in this manner.

CONCLUSION

In light of the foregoing, KXLF Communications respectfully requests that the Commission dismiss the Eagle Opposition and the Eagle Request forthwith and release a Notice of Proposed Rule Making proposing the substitution of Channel 5 for Channel 15 for use by KXLF-DT in Butte, Montana.

Respectfully submitted,

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¹² The Commission recognized that accepting comments prior to a Notice of Proposed Rule Making created a "built-in delay" in processing these petitions for rule making to amend the TV and FM allotment tables and thus eliminated the pre-Notice of Proposed Rule Making comment period to "expedite consideration" of these petitions. Amendment of Policies and Procedures for Amending the FM Table of Assignments, Section 73.202(b) of the Commission's Rules, *First Report and Order*, 88 FCC 2d 631, ¶¶ 4, 8 (1981).

CERTIFICATE OF SERVICE

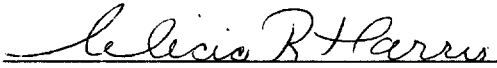
I, Alicia R. Harris, hereby certify that a true and correct copy of the foregoing "Reply to Opposition to Motion to Strike Eagle Communications, Inc.'s Request to Deny Petition for Rule Making" was sent on this 20th day of September, 2001 via first-class United States mail, postage pre-paid, to the following:

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